

Internal Revenue Service
memorandum

date: SEP 20 1991

to: Dianne Antoine, Employment Tax Specialist
New Orleans District

from: Ronald Moore, Technical Assistant
Office of the Assistant Chief Counsel
(Employee Benefits and Exempt Organizations)

subject: Off-Duty Police Details

This responds to your request for advice regarding the correct reporting of income earned by off-duty police officers (officers) engaged in police-related employment.

In your correspondence to this office you indicate that upon a third party request, officers are selected for off-duty assignments by the police department, from a roster maintained by the department. In addition, you state that the officers wear departmental police uniforms, use departmental police cars, and remain covered under the department's insurance when performing off-duty services. You also indicate that during off-duty assignments, the officers are subject to all disciplinary rules and regulations of the police department. Further, you have informed us that the police department determines the rate of pay for the off-duty services that the officers provide.

We assume from the information provided that the officers whose names are on the roster are full-time regularly employed officers of the police department. We also assume that the department withholds all applicable taxes from the wages that the officers receive for their full-time services.

In addition, you indicate that the police department bills the third party, and pays some officers for off-duty services from payments made by the third party to the department. In such cases the department issues W-2's to the officers. You state however, that in other situations, officers are paid directly by the third party, and in these instances W-2's are not issued to the officers.

Under the circumstances described above we believe the "off-duty" police officers remain employees of the police department in the performance of their off-duty activities.

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For purposes of income tax withholding, section 3401(d)(1) of the Internal Revenue Code and section 31.3401(d)-1 of the regulations provide that the term "employer" means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person. However, if the person for whom the services are, or were, performed does not have legal control of the payment of the wages for such services, the term "employer" means the person having such control.

In Otte v. United States, 419 U.S. 43 (1974), 1975-1 CB 329, the United States Supreme Court held that a person who is an employer under section 3401(d)(1) of the Code, for purposes of income tax withholding, is also an employer for purposes of FICA tax withholding under section 3102 of the Code. The Court held that even though the FICA provisions of the Code do not define "employer" as such, the term is not to be given a narrower construction for FICA withholding than for income tax withholding. See also the District Court's holding in re: Armadillo Corporation, 410 F. Supp. 407 (D. Col. 1976), aff'd 561 F. 2d 1382 (10th Cir. 1977), holding that the Otte rule applies equally to the employer's FICA tax imposed by section 3111.

Based on the information submitted by you, it would appear that section 3401(d)(1) of the Internal Revenue Code and section 31.3401(d)-1 of the regulations, along with the holding in the Otte case and the Armadillo cases would be applicable to situations where legal control of the payment of wages is relinquished to a third party payor.

Accordingly, in those situations in which the department pays the officers for off-duty services from payments made by the third party to the department, the department, as the common law employer, would be responsible for withholding all applicable taxes. In those situations where someone other than the police department has control over payment to the officers for their services, that person would be responsible for withholding all applicable taxes.

Further, we must point out that section 3401(d)(1) of the Code is not intended to cause FICA payments to be made with respect to amounts in excess of the contribution and benefit base (as defined by section 230 of the Social Security Act) in any calendar year, or where no liability exists. Therefore, both the wages paid by the department and the third party would be taken into account in determining the amount and extent of total FICA tax liability, if any.

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Finally, this technical assistance, which is based upon a very general description of the facts, cannot be cited in closing any case.

If you need further assistance on this matter, please contact Lou Ann Craner of my staff, at FTS - 566-4748.

(Signed) Ronald L. Moore

RONALD L. MOORE